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SUMMARY RECORD OF THE 600th MEETING

Held at Headquarters, New York,
on Friday, 7 June 1996, at 3 p.m.

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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The meeting was called to order at 3.20 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421; A/CN.9/XXIX/CRP.3)

1. Mr. BURMAN (United States of America) said that the occasion of the 600th meeting of UNCITRAL was a source of pride to all delegations since the Commission had contributed substantially to the harmonization of legal procedures between nations with different legal systems and from different parts of the world. It was widely recognized that over the years UNCITRAL had achieved its objectives while remaining non-politicized, technically focused and productive.

2. Mr. RENGER (Germany) said it was essential at the current session that the Commission should not only adopt the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication but also take a definitive decision concerning the Guide to Enactment. Changes would necessarily have to be made in the draft Guide as a result of the changes made to the text of the Model Law. In that connection, he urged delegations to submit any outstanding comments to the secretariat so that they could be incorporated into the Guide for publication.

3. Mr. VARŠO (Slovakia) noted that while there was a consensus on the need to issue the Model Law and the Guide at the same time, there was no consensus concerning the adoption of the Guide by the Commission. A compromise whereby the Model Law would be published on behalf of the Commission while the Guide was prepared by the secretariat and issued with the authorization of the Commission, might accommodate the concerns of the Singaporean and other like-minded delegations.

4. Ms. ALLEN (United Kingdom) said her delegation endorsed the view that the Model Law and the Guide should both be adopted at the current session of the Commission. She had great faith in the secretariat's ability to come up with a satisfactory Guide.

5. Mr. GOH (Singapore) said that in view of the desire of many delegations to have the Model Law and Guide published at the same time and as early as possible, his delegation would have no objection to the compromise procedure suggested by the representative of Slovakia.

6. Mr. ZHANG Yuqing (China) said that while his delegation was not opposed to the compromise solution suggested by the representative of Slovakia, it still felt that since the Guide in its entirety had not been discussed by the Commission, it was not appropriate to publish it in the name of the Commission.

7. Mr. SORIEUL (International Trade Law Branch) said it was obvious that, if a single document contained both the Model Law as adopted by the Commission and a guide published by the Commission secretariat and authorized by the Commission, it would be difficult for most readers to distinguish between the authority of the Model Law and that of the Guide. Further difficulties would arise should the Commission be unable to publish the Guide in the same document as the Model

Law. He would have to consult the rules governing United Nations publications, for the issue was certainly a complex one.

8. Mr. BURMAN (United States of America) suggested deferring final action on the Guide until the secretariat had had an opportunity to review the matter in the light of the applicable United Nations procedure. He hoped that those delegations which were not wholly in agreement with the substantial majority that favoured authorizing the secretariat to publish the Guide might also be given some time to reconsider their positions. However, any solution that permitted the Guide to be published separately from the Model Law because of the different legal status of the two documents would be unacceptable.

9. Mr. ABASCAL (Mexico) agreed with the statement made by the representative of the United States of America.

10. The CHAIRMAN said that action on publication of the Guide would be deferred. She then invited the Commission to consider further revisions to the provisions of the Model Law.

Article "x"

11. Ms. BOSS (United States of America) introduced her delegation's proposed amendments to paragraph 3 of article "x" as amended by the United Kingdom (A/CN.9/XXIX/CRP.3). Paragraph 3 was intended to deal with situations where transfers of rights had been accomplished in the past by data messages and a decision had been made to convert to paper. Paragraph 3 (a) was intended to protect the holder of a right acquired by means of a data message against involuntarily losing that right by the issuance of a paper document while paragraph 3 (b) gave full warning to further transferees of that paper document that although data messages had been used in the past, they could no longer be used. The last sentence was based on the original version of article "x", paragraph 3.

12. Ms. REMSU (Observer for Canada), noting that the Model Law sought to open the door to the use of electronic technology, said that paragraph 3 (b) meant that once paper was adopted instead of electronic technology, parties who took interest in goods subsequent to the conversion from electronic technology to paper were barred from using such technology even though it might be EDI-capable. Indeed, paragraph 3 (b) seemed not only to contradict the overall purpose of the Model Law by not facilitating the use of technology but also to let the State, rather than the parties shape the practice.

13. Mr. LLOYD (Australia) said that his delegation had some reservations about paragraph 3 (b) and would prefer to delete it. If the goal of the provision was to stop reversion from paper documents to electronic messages, it would not work; requiring that a statement should be made in a document was not the same as prohibiting such a reversion. Furthermore, if a mistake was made in a bill of lading and an electronic message was replaced by a paper document but, either mistakenly or inadvertently, the statement required in paragraph 3 (b) was not included, that bill of lading would be considered invalid and the effect would be to penalize a bona fide recipient of a paper bill of lading, who would have

to seek recourse under domestic law. The penalty should be targeted towards the issuer of the paper bill of lading.

14. Ms. BOSS (United States of America), replying to the observer for Canada, said that paragraph 3 (b) was not intended to disempower the parties from surrendering a paper document at a later stage and issuing data messages instead. Her delegation's amendments were intended to make it clear that so long as a paper document was outstanding, data messages could not be used. To that end, the words "in place of the paper document" could be changed to "while such paper document is outstanding". That would constitute a warning to the issuer of the paper document and any subsequent holders that if there was a reversion to data messages, the two could not exist simultaneously, and that the paper document must be surrendered; that was consistent with maritime practice.

15. Mr. BURMAN (United States of America) said he could not agree with the points made by the representative of Australia. It was very important to keep the provisions of the Model Law consistent with existing maritime practice, and paragraph 3 (b) had been crafted after lengthy deliberations. The most that could be done in bill-of-lading practice was to rely on the statements in the documentation; it was not possible to reassess the rights and obligations that derived from them. It had to be assumed that the parties were aware of the documentation they received. The possibility of the existence of duplicate bills of lading was faced by every issuer and every person who honoured a bill of lading; if there was a discrepancy, nothing in article "x" prevented action being taken against the issuer.

16. Mr. MASUD (Observer for Pakistan) said that the use of the word "effect" in the first line of paragraph 3 meant that the right or obligation had already been transferred. That being so, it was not clear how that right or obligation could subsequently be effected by a paper document, or how any contradiction between the two actions would be resolved. The last sentence of the paragraph also highlighted that contradiction.

17. Paragraph 3 (b) referred only to the carrier and the consignee, but made no mention of the shipper and gave no indication of how disputes between the shipper and the carrier would be resolved. The use of the word "acquired" in paragraph 3 (a) was inconsistent with paragraph 4, in which the word "granted" had been used; it would be better to use the verb "acquire" in both cases.

18. Mr. FALVEY (Observer for the International Association of Ports and Harbors), referring to the concerns expressed by the observer for Canada, said that article "x" dealt with actions in pursuance of a contract for the carriage of goods. It was therefore unlikely that it would apply to a transaction subsequent to the completion of such a contract, since the key action for completion of such contract was the delivery of the goods to the persons entitled to receive them. Paragraph 3 (a) was designed to provide protection both to the person subject to the obligation to deliver and to the holder of a right acquired by means of a data message indicating that the goods would be delivered to the person who was entitled to receive them. It was not possible to have both a data message and a paper bill of lading being presented as the basis for delivery. The carrier would therefore rely on the data message unless it had been agreed between the holder of a right acquired by means of a data

message and the carrier that data messages were no longer valid for the purpose of the delivery of goods. Even after the presentation of a properly substituted paper bill of lading, a data message could be used to direct a carrier to deliver to a different location than that specified in the bill of lading.

19. Mr. PHUA (Singapore) said that it was made clear in paragraph 43 of the report of the Working Group (A/CN.9/421) that the draft article was based on the Rules for Electronic Bills of Lading of the Comité maritime international (CMI), known as the CMI Rules, and the BOLERO project. He asked the secretariat to update the Commission on pilot projects carried out under the CMI Rules and the BOLERO project.

20. Mr. ILLESCAS (Spain) said that his delegation endorsed the point made by the observer for the International Association of Ports and Harbors. If a consignee claimed goods on the basis of a paper document and another consignee in the same port claimed the same goods on the basis of a data message, enormous problems would arise. His delegation therefore urged caution, particularly since some national laws required the use of paper-based bills of lading.

21. He suggested that in paragraph 3 (a), the word "previously" should be added before the words "ceased to be valid"; otherwise there would be a period during which goods were documented both by a data message and by a paper bill of lading, and that situation must be avoided. He also suggested that the words "derived from the data message" should be added at the end of the last sentence of paragraph 3 so as to avoid raising the question of rights and obligations derived from documents or data messages other than the transport document itself.

22. Lastly, in the Guide to Enactment, Governments should be advised to bear in mind the possibility of converting paper-based documents to electronic messages.

23. Mr. BURMAN (United States of America) said that the fact that neither the CMI Rules nor the BOLERO project had yet achieved widespread application, reflected uncertainty in the absence of national laws which provided a level of predictability and commercial protection in the use of electronic messages. Both sets of rules were premised on existing maritime practice, and the Commission would be unwise to depart from them. Paragraphs 3 and 4 aimed to facilitate the adoption of electronic bill-of-lading practice.

24. Ms. BOSS (United States of America) said her delegation agreed that it should be made clear in the Guide to Enactment that article "x" dealt only with certain aspects of bill-of-lading practice and that there were other areas which needed to be considered at the same time. The first requirement to be met in making an effective conversion from paper to electronic documents was the cancellation or surrender of outstanding bills of lading, and that was part of maritime practice: a new bill of lading was not issued until the prior bill was returned.

25. As to the Spanish proposal regarding paragraph 3 (a), her delegation would prefer to include an explanation in the Guide to Enactment. In any case the situation was covered: if the use of data messages ceased to be valid, and a new data message was subsequently used, it would be invalid under

paragraph 3 (b). There was no need to make provision for the period after the issuance of the paper document. Moreover, the statement in paragraph 3 (b) was being made by the issuer, and was therefore binding on him.

26. Mr. Won-Kyong KIM (Observer for the Republic of Korea) said that if there were situations in actual practice in which paper documents were converted to data messages, they should be covered in the Model Law. The impact on national legislation would not be the same if such situations were merely referred to in the Guide to Enactment.

27. The words "rule of law" in paragraph 3 should be changed to "law", as already agreed and in line with paragraph 4.

The meeting was suspended at 4.35 p.m. and resumed at 5.20 p.m.

Draft Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication (A/CN.9/426)

28. Ms. BOSS (United States of America), referring to the heading of chapter I, section C, said that its wording appeared to invite the imposition of a regulatory framework onto a Model Law the essence of which was to give a certain degree of flexibility to the parties engaged in electronic commerce. She suggested that the words "to be supplemented by technical regulations" should be deleted. In addition, the second sentence of paragraph 28 of the Guide should perhaps be slightly modified.

29. Mr. ABASCAL (Mexico) suggested that, although the enactment of the Model Law as a single instrument would be recommended to States, the Guide should indicate that it was possible for them to incorporate the model rules into national legislation as a series of separate provisions.

30. Mr. SORIEUL (International Trade Law Branch) recalled that that issue was discussed in paragraphs 19 and 20. It might also be desirable to include a few words on the subject in chapter I, section B, of the Guide, which dealt with the scope of the Model Law.

31. Mr. ABASCAL (Mexico), referring to paragraph 34 of the Guide, proposed that the last sentence should be deleted. The Model Law should cover both definitions of "system rules" as defined in the paragraph.

32. Ms. BOSS (United States of America) supported the proposal of the representative of Mexico. With regard to the matter discussed in paragraphs 19 and 20, she said that some readers could be confused by reading the section entitled "History and background of the Model Law" (paras. 1-21) before they read the rest of the document. It would be better to begin the Guide with a brief summary and to include the "History and background" section in an annex.

33. Mr. MADRID (Spain) and Mr. PHUA (Singapore) agreed that the Guide would be more readily understandable by legislators if it began with a brief executive summary stating clearly and concisely the purpose of the Model Law and the content of the Guide.

34. Ms. GUREYEVA (Russian Federation), referring to the remarks of the representative of the United States of America regarding paragraphs 28 and 29, wondered why emphasis was placed on the technical aspects of the Model Law. She also wondered what provisions would be made so that in the future the text of the Model Law as a whole could be changed as appropriate.

35. Mr. BURMAN (United States of America) said that the Commission could undertake a re-examination of the text at any time in order to bring it up to date.

36. Mr. SORIEUL (International Trade Law Branch) agreed with the suggestion that the "History and background" section should be placed in an annex to the Guide. He agreed that periodic reviews of the Model Law would be desirable because of the particular nature of the subject matter and the rapid technical changes that could be expected; for that same reason it would also be useful for the current text to be described as the "1996 version" of the Model Law.

37. Mr. PHUA (Singapore), referring to paragraph 39 of the Guide, said that the wording of the second sentence should be clarified, since it might be thought to extend the coverage of the Model Law to paper-based documents.

38. The CHAIRMAN said that the appropriate drafting changes would be made.

The meeting rose at 6 p.m.